***THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY**

+ WRIT PETITION NOS : 22327 & 22328 of 2005

% 03-11-2005

K.SESHAGIRI RAO & CO., HYDERABAD…. PETITIONER

VS.

$ 1. RASHTRIYA ISPAT NIGAM LTD.,

VISAKHAPATNAM STEEL PLANT.

2. THE DEPUTY GENERAL MANAGER,

WORKS AND CONTRACTS DEPT.,

RASHTRIYA ISPAT NIGAM LTD.VISHAKPATNAM.

… RESPONDENTS

! Counsel for the Petitioners: MR.C.SUMON

^ Counsel for the Respondent No.1 : MR.A.PURUSHOTTAM REDDY

< Gist:

> Head Note:

? CITATIONS:

AIR 1996 SC 11

2 2000(4) ALT 229

3 2003(3) ALT 1 (DB)

COMPUTER NO.

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NOS.22327 AND 22328 OF 2005

COMMON ORDER DT: 03-11-2005.

BETWEEN:

K.SESHAGIRI RAO & CO.,

HYDERABAD. … PETITIONER

AND

1. RASHTRIYA ISPAT NIGAM LTD.,
   VISAKHAPATNAM STEEL PLANT.
2. THE DEPUTY GENERAL MANAGER,
   WORKS AND CONTRACTS DEPT.,
   RASHTRIYA ISPAT NIGAM LTD.
   VISHAKPATNAM. … RESPONDENTS

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NOS.22327 AND 22328 OF 2005

COMMON ORDER:

1 . These two writ petitions are filed assailing the action of the respondents in disqualifying the petitioner-firm from the tender process. W.P.No.22327 of 2005 relates to tender notification dated 22.7.2005 and W.P.No.22328 of 2005 relates to tender notification dated 12.7.2005.

2. The petitioner-firm is a registered firm. It undertakes works of steel and iron scrap processing including emergency container management and also transportation of slag and debris etc. The respondents issued open notice No.VSP/WC/SSD/ 55223-0/0/2000-06, dated 22.7.2005 inviting pre-qualification for the work of steel and iron scrap processing including emergency container management in VSP (inside the

plant). The respondents also issued open notice No.VSP/WC/SSD/55198-0/0/2005-06, dated 12.7.2005 inviting pre-qualification for the work of central dump processing for the period 2005-08. Under the said open notices 12 pre-qualification criteria are mentioned. The petitioner-firm submitted its pre-qualification bids to 2nd respondent. All the required documents in proof of eligibility of the petitioner were also enclosed. 2nd respondent being satisfied about the eligibility of the petitioner-firm forwarded its applications to 1st respondent along with the applications of others. 1st respondent rejected the applications made by the petitioner-firm on the ground that the petitioner-firm does not satisfy pre-qualification criteria No.2. Criteria No.2 in respect of open notice dated 12.7.2005 reads as follows:

" The Tenderer should have executed a single work of similar nature of value not less than Rs.625 lakhs during the last five years ending 30.6.2005."

Criteria No.2 in respect of open notice dated 22.7.2005 reads as follows:

" The Tenderer should have executed a single work of similar nature of value not less than Rs.786 lakhs during the last five years ending 30.6.2005."

Since respondents disqualified the petitioner firm on the ground of not satisfying criteria No.2 of prequalifications, these two writ petitions are filed.

3. The respondents filed common counter affidavit for both the writ petitions and it is, in brief, as follows:

The petitioner-firm submitted copies of three work orders awarded in its favour by M/s.Jindal Vijayanagar Steel Ltd to satisfy criteria No.2 referred to in the two notices. The work orders furnished by the petitioner-firm relating to M/s Jindal Vijayanagar Steel Ltd are as follows:

Sl.	WORK ORDER NO.	DESCRIPTION OF THE

NO. AND DATE WORK

1. JVSL/VJNR/BOF/R/W/ REMOVAL OF HOT SLAG,
4031, DT.14.10.2003 TRANSPORTATION AND
UNLOADING AT DESIGNA
-TED PLACE.

2. JVSL/VJNR/BOC/R/W REMOVAL OF HOT SLAG,
4045, DT.3.9.02 TRANSPORTATION AND'
UNLOADING AT
DESIGNATED PLACE.

3. JVSL/VJNR/BOC/R/W/ SCRAP RECOVERY OPERA-
4048, DT.20.2.2004 TION AT BASIC OXYGEN
FURNACE (BOF) AND
CONTINUOUS CASTING
PLATFORM (CCP).

The said work orders submitted by the petitioner-firm do not provide therein value of the works. In the absence of information relating to the value of the work orders it was not possible to assess the eligibility of the petitioner firm with reference to the above referred criteria No.2 i.e. the petitioner firm has executed a single work of the value specified in the notice. I deem it appropriate to refer para 12 of the counter and it reads as follows:

> " 12. Subsequent to this commutation the petitioner has addressed two identical letters dated 18.8.2005, for both the open notices, enclosing there to a certificate issued by Jindal Vijayanagar Steel Ltd, certifying the fact that the petitioner is the contractor for the above referred three works for which work orders were submitted. Though the open notices issued by the 1st respondent specifically provide that no correspondence with regard to the pre-qualification criteria would be entertained the petitioner sent the above said

communications seeking to explain as to how he satisfies the pre-qualification criteria No.2. Even if the said documents are taken into consideration the petitioner does not satisfy the qualification criteria for the following reasons:

i. Documents submitted by the petitioner reveal that it has not executed single work of similar nature of the value specified in pre-qualification condition NO.2. The petitioner submitted work order and values for three works. None of the works are of the value equivalent to or more than 625 lakhs or 786 lakhs prescribed in the open notices. The value of the three works submitted are as follows:

1. Rs.6,04,40,647/-, 2) Rs.2,86,05,084/-, 3) Rs.2,03,65,289/-.

ii. A perusal of the three work orders reveal that two of the work orders dated 14.10.2003 and 3.9.2002 relate to hot slag transportation and unloading at designated place. These works are not similar and are totally different from the notified works of the respondent. As seen from the documents submitted by the petitioner the said two works involve cleaning of slag pits and transportation of hot slag and steel skull from slag yard to designated place etc. Apparently this work does not involve recovery of steel scrap, iron scrap, steel/iron fines used/rejected refractories from slag and muck from the Central Dump or from all over the plant and transportation of the same to the concerned department or processing yards to process the same and work relating to emergency container management. Hence, two of the work orders submitted for the purpose of satisfying the pre-qualification criteria relating to similar work are totally irrelevant.

iii. The third work order dated 20.2.2004 submitted by the petitioner relates to scrap recovery operations at Basic Oxygen Furnace (BOF) and continuous casting platform (CCP). Though this work is to some extent similar to the notified work the value of this work is far below the value stipulated in the pre-qualification condition No.2. Hence, the same cannot be considered for both the works.

iv. The pre-qualification condition No.2 which prescribes the value of a single similar work actually represents only 50% of the estimated value of the works notified. The petitioner does not possess the experience of handling work worth 50% of the estimated value. Hence, the petitioner cannot have a grievance if tender documents are not provided to him."

It is crystal clear from the work orders that the nature of works handled by the petitioner firm is entirely different from the works to be taken up in pursuance of the two open notices in question. A plea has been taken in the counter affidavit that after

identifying the eligible agencies who satisfied pre-qualification criteria, tender schedules were issued to them on 26.9.2005 and all the eligible bidders submitted their price bids and the same were opened on 11.10.2005 and the lowest bidder was also identified. In view of the subsequent developments no cause survives in both these writ petitions.

4. A common reply affidavit has been filed by the writ petitioner for the counter affidavit of the respondents. It is stated in the reply affidavit that two work orders dated 19-10-2003 and 20-2-2004 executed by the petitioner for JVSL should be construed to be a single work as the work orders were executed concurrently without any interruption in the same plant. If the value of the works in the aforementioned two work orders is taken together, the same would be a tune of Rs.8,08,25,937/-. The works mentioned in both the tenders issued by the respondents and the works undertaken by the petitioner firm with JVSL are one and the same. The action taken by the respondents pending adjudication of the above writ petitions is always subject to the result of the writ petitions.

5. Heard C.V.Mohan Reddy, learned senior counsel appearing for the petitioner firm and Sri.Ravinder, learned counsel appearing for the respondents.

6. Learned senior counsel submits that the petitioner firm had undertaken works of similar nature notified in the two notices and therefore the petitioner firm possessed requisite qualifications to participate in the tender process. He further submits that the respondents have not properly appreciated the documents enclosed to the pre-qualification bids and thereby erred in disqualifying the petitioner firm from participating the tender process for the works notified in open notices dated 12th and 22nd of July, 2005. He referred the pre-qualification criteria mentioned in the two notices and nature of work turned out by the petitioner firm in JVSL. He also made reference to the statement of works done by the petitioner firm in JVSL.

7. Learned counsel appearing for the respondents submits that the works turned out by the petitioner firm in JVSL are not similar to the works required to be carried out

as per the open notices dated 12th and 22nd of July, 2005 in Visakhaptanam Steel Plant and therefore the respondents are justified in disqualifying the petitioner firm from participating in further process. He also submits that out of three work orders on which the petitioner firm placed reliance, only one work order dated 20.2.2004 relates to identical work notified in the two open notices. But the value of the work under execution upto 30-6-2005 was only Rs.2,03,65,289 and thereby it falls far less than the value of the works which the tenderer is required to be carried out to become eligible to participate in the tender process. By referring the work orders dated 3.9.2002 and 14.10.2003 he submits that these work orders relate to removal of hot slag, transportation and unloading at designated place. The works required to be undertaken in pursuance of the open notices dated 12th and 22nd of July, 2005 are with regard to handling and removal of cold slag and; therefore the value of work turned out by the petitioner firm under the two work orders cannot be taken into consideration. Yet another submission made by him is that respondents having expertise knowledge in assessment of nature of works opined and that the petitioner firm did not possess the pre-qualification to participate in the tender process and therefore the opinion of the respondents cannot be likely be interfered in exercise of the jurisdiction under Article 226 of the Constitution of India. In support of his submissions, reliance has been placed on the decision of Supreme Court in TATA CELLULAR V. UNION OF INDIA and the decisions of our High Court in R.NARAYANA REDDY AND SONS PRIVATE LTD. V. UNION OF INDIA and UNION OF INDIA V. M/S LAXMI BUILDERS. In the first cited decision the Supreme Court held that the principles of judicial review would apply in exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. In the second cited decision, a question came up for consideration as to whether the tenderer has experience in executing similar work. While dealing with the powers of the court with regard to the interference of the opinion arrived at by the department, a learned single Judge observed as follows:

> " 10. Obviously, these conditions are included in the tender notification with a view to make an assessment whether a person tendering for the work has some experience in the matter or not. Once again experience can be of two kinds: The person might have the experience of having carried out similar work technically –

> i.e., the nature of the work be identical or similar, but experience is not only technical expertise. The condition as I understand requires both. In my view, clause 5(a) of the tender conditions extracted above, is significant when this tender condition stipulates that the tenderer should have completed one work of similar nature costing more than 50% and that stipulation takes care of the experience of the tenderer both as to the technical expertise and possession of the necessary infrastructure. To carry out one work or of a particular value within the given time, requires more infrastructure logically than to carry out six different works which are technically identical, but of lesser value individually but cumulatively of the same value of work as is in the earlier case at different points of time in a span of last 3 years."

In the third cited decision a Division Bench of this Court observed that when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an importation role in deciding to whom the contract should be awarded.

8. The question that falls for consideration is whether the petitioner firm satisfied the pre-qualification criteria to participate in the tender process ?

Criteria No.2 in respect of open notice dated 12.7.2005 reads as follows:

" The Tenderer should have executed a single work of similar nature of value not less than Rs.625 lakhs during the last five years ending 30.6.2005."

Criteria No.2 in respect of open notice dated 22.7.2005 reads as follows:

" The Tenderer should have executed a single work of similar nature of value not less than Rs.786 lakhs during the last five years ending 30.6.2005."

The open tender notices specially require that the tenderers should have executed a

single work of similar nature during the last five years ending 30.6.2005. Its value in the first tender notice shall not be less than 625 lakhs and whereas in the second tender notice, it shall not be less than 786 lakhs. The petitioner firm contends that it satisfied criteria No.2 in both the notices since it executed works of similar nature with the required value in JVSL.

9. It is well settled and needs no reiteration that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The parameters of judicial review are too well settled in the matter of exercise of contractual powers by the governmental bodies. This Court does not exercise any appellate jurisdiction over the decisions taken by the governmental bodies in the matter of awarding contract. The Court, of course, would interfere to prevent arbitrariness or favouritism and to protect larger public interest. The Court in exercise of its judicial review jurisdiction is concerned with decision making process, but not with the decision itself. This Court in appropriate cases may issue writs directing the State, its Corporations, instrumentalities and agencies to adhere to the norms, standards and procedures laid down by them and prevent them from departing from those norms arbitrarily. The Court, of course, would interfere if the decision is found vitiated by mala fides, unreasonableness and arbitrariness.

10. It is well settled that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations, which are of paramount importance, are commercial considerations. Such considerations include the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; and past experience of the tenderer and whether he has successfully completed similar work earlier.

11. The petitioner-firm placed reliance on the work orders issued by JVSL to satisfy that it executed a single work similar in the nature with requisite value during the last five years ending 30.6.2005. Learned senior counsel appearing for the petitioner firm

read brief description of the work in both the open notices dated 12.7.2005 and 22.7.2005 and also the nature of work detailed in the work orders dated 14.10.2003 and 3.9.2002. The work orders dated 14.10.2003 and 3.9.2002 relate to removal of hot slag, transportation and unloading at designated place. The respondents have taken a specific stand in their counter affidavit that handling of hot slag is not the subject matter of the two open notices. It is also stated in the counter affidavit that the works relating to hot slag was entrusted to some other contractor. The work orders dated 14.10.2003 and 3.9.2002, on plain reading indicate that the petitioner firm undertook the work of removal of hot slag, transportation and unloading at designated places. The open notices dated 12.7.2005 and 22.7.2005 did not involve handling of hot slag and therefore the nature of work turned out by the petitioner firm under the two work orders are not similar to the nature of work which a tenderer is required to attend in the two open notices. With regard to work order dated 20.2.2004 the work detailed therein is almost similar to the works mentioned in the two open notices, but the value of the work turned out by the petitioner firm in JVSL comes to only Rs.2,03,65,289/- which is far below the value of the work mentioned in criteria No.2 of the two open notices.

12. For the foregoing reasons, these two writ petitions are liable to be dismissed and the same are hereby dismissed. No costs.

Dated: 03-11-2005. (B.Seshasayana Reddy,J)

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THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NOS.22327 AND 22328 OF 2005

COMMON ORDER DT: 03-11-2005.